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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

QUOC TRUNG NGUYEN,

Defendant and Appellant.

G040185

(Super. Ct. No. 05ZF0092)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

Kimberly J. Grove, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Theodore M. Cropley, Deputy Attorneys General, for Plaintiff and Respondent.

Quoc Trung Nguyen appeals from a judgment after a jury convicted him of murder, attempted murder, and street terrorism and found true various special circumstances and enhancements.¹ Nguyen argues he was unlawfully convicted based on uncorroborated accomplice testimony and the trial court erroneously instructed the jury on the “kill zone” theory. Neither of his contentions have merit, and we affirm the judgment.

FACTS

During a fight at La Quinta High School, a car drove by and someone inside the car fired a gun at a group of people who had gathered to watch the fight. Around the same time, near the high school, several Asian gang members assaulted a relative of a rival Asian gang at an internet cafe.

Later that evening, members of the allied Asian criminal street gangs “Asian Crips” (Nguyen and Michael Nguyen (Michael)), “Natomia Boys” (Cuong Nguyen (Cuong), Phuoc Tran (Phuoc), James Diep, Tai Nguyen (Tai), Duong Hoang, Kevin Tran (Kevin), and Long Phan (Long)), and “Young Locs” (Phong Nguyen (Phong), Tung Huynh, and Nicol Pang), and a man named Travis² met at the garage of one of the gang members to discuss the shooting and the assault. The mob concluded “Dragon Family” gang members were responsible for the shooting and the assault, and they sought retaliation. Nguyen produced a musical instrument case, opened it, and pulled out a shotgun. The men decided to search for Dragon Family gang members, and its ally, Asian Gang, and assault or shoot them. The men left in four vehicles.

As relevant here, Diep drove his green Honda Accord with Nguyen, armed with his loaded instrument case, riding shotgun. Phuoc drove his gold or beige Acura

¹ As we explain below, before trial Nguyen pleaded guilty to other offenses and admitted he suffered a prior conviction.

² The record does not provide Travis’s last name.

Legend with Cuong and Travis in the car. Finally, Hoang drove his blue Toyota Camry with Phong and Tai riding with him.

As Diep drove into a residential neighborhood with Phuoc following him, Diep made several U-turns before he spotted Nhan Chuong, a member of the Dragon Family gang, sitting in his parked car. Sitting next to him in the passenger's seat was his friend, Duong Phan, another Dragon Family gang member. Khanh Tran, another friend, had just gotten out of the car and walked to a friend's house.

As Tran walked to his friend's house, Diep drove next to Chuong and Tran, asked Tran where he was from. Tran said, "nowhere" and walked into his friend's house.³ Diep drove his car next to Chuong's car and stopped with the passenger side of the car next to the driver's side of Chuong's car. Nguyen, who was wearing gloves, pointed the shotgun outside the passenger's side window and pulled the trigger once, and Diep sped away. Both Chuong and Phan were struck. Phan heard the shot and felt it hit his head. Phan got out of the car and ran to a nearby house for help. The house's owners, who heard the shot and saw wood particles fly through their living room, assisted Phan and called 911. Phan survived the gunshot wounds to his head, but Chuong died.

Back at the garage, Nguyen told his confederates that he confronted someone in a parked car, said, "Fuck [Dragon Family]," and shot someone. Nguyen said he was going to drive to the "909" area to return the shotgun; he left in a white Honda Accord that he had borrowed from his girlfriend.

During the investigation, Officer Carl Whitney seized a dark green Honda Accord with a loud muffler from Diep. Whitney interviewed Nguyen. When Whitney showed him photographs of 13 individuals, Nguyen denied he knew or met Diep, Phuoc, Phong, or Cuong, among others. When Whitney asked Nguyen where he was the night of the shooting, Nguyen said he worked until 7:00 p.m. and went home. Whitney,

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At trial, Tran testified the car's muffler was loud.

however, never told Nguyen what day the shooting had occurred. When Whitney asked him to tell the truth, Nguyen responded, “‘I’m not a rat[,]”” and “‘Even if I die in the electric chair, I’m for real.”” Another officer found a shotgun buried in a backyard in Riverside.

An amended indictment charged Nguyen with the murder of Chuong (Pen. Code, § 187, subd. (a))⁴ (count 1), willful, deliberate, and premeditated attempted murder of Phan (§§ 664, subd. (a), 187, subd. (a)) (count 2), street terrorism (§ 186.22, subd. (a)) (count 3), possession of a firearm by a felon (§ 12021, subd. (a)(1)) (count 4), and street terrorism (§ 186.22, subd. (a)) (count 5).⁵ The indictment alleged the special circumstances that count 1 was a murder by drive-by shooting (§ 190.2, subd. (a)(21)) and was committed for a criminal street gang (§ 190.2, subd. (a)(22)), and alleged he personally discharged a firearm causing death (§ 12022.53, subd. (d)). The indictment also alleged he personally discharged a firearm causing great bodily injury as to count 2 (§ 12022.53, subd. (d)). As relevant here, the indictment alleged Diep committed counts 1 and 2 for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The indictment also alleged he suffered a prior serious and violent felony conviction for which he served a prison term and did not remain free for five years (§ 667, subd. (a)(1)).

At trial, the prosecutor offered the testimony of Janis Ha. Ha testified Nguyen was “[her] baby’s daddy.” She stated that in March 2004, she drove a white Honda Accord. She said that at the time, Nguyen was a member of the Asian Crips gang and his nickname was “C.” As the prosecutor showed her photographs of individuals, Ha identified them and said she met them through Nguyen or had seen Nguyen associate

⁴ All further statutory references are to the Penal Code, unless otherwise indicated.

⁵ Counts 4 and 5 concerned offenses that occurred one week before the events detailed above. Before trial, Nguyen pleaded guilty to those counts, and he admitted the truth of the prior conviction allegations.

with them. They were photographs of Diep, Phuoc, Pang, Phong, Hoang, Michael, Kevin, and Long. The prosecutor asked her whether she told an investigator that on March 19, 2004, the day of the shooting, Nguyen used her car. Although she did not remember telling the investigator that she did not see him until the next day, but if she did it must have been true.

The prosecutor also offered the testimony of Whitney. Whitney testified he interviewed Phong approximately three weeks after the shooting. Phong initially denied knowing anything about the shooting but eventually said he was at the garage when he saw a black case containing a shotgun. Phong said he saw a person everyone called “C” get into Diep’s car and leave. Phong explained that when he returned to the garage, Diep told them C shot two people and he left in a white Honda Accord to go to the “909” area. Phong identified Nguyen as C. Whitney also stated he interviewed Phuoc months after the shooting. Phuoc said C got into Diep’s green Honda Accord with a shotgun, and Phuoc drove his gold Acura. Phuoc said he saw C, who was a member of the Asian Crips, fire the shotgun from the passenger’s seat of Diep’s car. On cross-examination, Whitney admitted Phong and Phuoc initially told him they did not see a gun.

At trial, the prosecutor offered the testimony of Cuong, an accomplice, who testified he was a member of the Natoma Boys Jr. gang and his moniker was “Cholo.” Cuong explained that when he arrived at the garage, there were numerous allied gang members discussing the shooting and the assault and preparing to retaliate. Cuong stated he saw Nguyen walk into the garage with a violin case and pull a gun from the case. Cuong said after the men formulated their plan, they got into four cars. Nguyen, with the violin case, got into Diep’s Honda Accord. Cuong and Travis got into Phuoc’s Acura Legend. Phong and Tai got into Hoang’s Toyota Camry. Phuoc followed Diep, and after breaking off and driving to a known gang hangout, Phuoc met back up with Diep and followed him into a residential area. Diep stopped his car next to a parked car; the passenger side of Diep’s car was next to the driver side of the parked car. Cuong testified

he was approximately 15 feet from Diep's car and a gun appeared from the passenger side window and he heard a shot. Cuong stated he believed Nguyen was the person who fired the gun. Cuong claimed he never reported the shooting to the police because he was scared, and he initially lied to the police, including about not seeing a gun, because he was afraid for his life. On cross-examination, Cuong admitted he was testifying because he faced prosecution for murder and attempted murder and a sentence of 25 years to life. Cuong believed he would be released after his testimony.

Phuoc, another accomplice, also testified for the prosecution. Phuoc testified he was a member of the Natoma Boys Jr. gang. Phuoc stated that when he got to the garage, there were many people there, including Nguyen, who had a shotgun. Phuoc said Nguyen got into Diep's Honda Accord with the shotgun, and Cuong got into his Acura Legend. Phuoc explained that if they encountered any police as they hunted for rival gang members, he was to act as a decoy and be pulled over because the gun was in Diep's car. Phuoc followed Diep and they eventually drove into a residential area where Diep eventually stopped his car next to a parked car. Phuoc saw Nguyen fire the shotgun into the driver side of the parked car. On cross-examination, Phuoc admitted he lied to the police during previous interviews because he was scared. Specifically, he told officers he did not see a gun in the garage, but others told him there was a gun. Also, he told officers he saw Nguyen in Diep's car, but Cuong told him that Nguyen was in the car. Phuoc also admitted he was testifying because he faced prosecution for murder and attempted murder and a sentence of 25 years to life. Phuoc believed he would be released after his testimony.

Phong, similarly an accomplice, also testified for the prosecution. Phong testified he was a member of the Young Locs gang. He stated there were 10 to 15 people at Tung Nuynh's garage, including Nguyen. Phong said, "Tiny" brought a shotgun in an instrument case to the garage. The men devised a plan where one group would look for gang rivals and fight them, and the other group would look for gang rivals and shoot

them; Phong was part of the first group. He said Nguyen got into Diep's dark Honda with the shotgun. He explained Phuoc's job was to follow Diep. After two hours of driving around looking for gang rivals without success, Phong and his confederates returned to the garage. Nguyen told Phong they found a Dragon Family gang member and he said, "Fuck [Dragon Family]," and he got out of the car and shot him. Nguyen told him he was going to the "909" area to return the gun and he left in a white Honda Accord. On cross-examination, Phong stated he was being prosecuted for first degree murder and he was testifying with the hope the charges would be reduced. He admitted that during an interview with police, he told them Diep said he shot the rival gang member, and he must have been confused.

The prosecutor also offered the testimony of Officer Peter Vi, a gang expert. After detailing his background, training, and experience, Vi testified concerning the culture and habits of Asian criminal street gangs. Vi explained the Asian Crips, Young Locs, and Natoma Boys were allies, and their rivals were Dragon Family and Asian Gang. He opined the victims, Chuong and Phan, were Dragon Family gang members. Based on Nguyen's tattoos, his law enforcement contacts where he admitted membership in Asian Crips, and photographs showing him adorned in gang paraphernalia flashing gang signs with other known gang members, Vi also opined that at the time of the shooting, Nguyen was an active participant in Asian Crips and his moniker was "Chop Stick" or "C." Two of the photographs showed Nguyen and Diep, a Natoma Boys gang member. Based on a hypothetical mirroring the facts of this case, Vi opined the offenses were committed in association with and for the benefit of a criminal street gang.

The jury convicted Nguyen on all counts and found true all the enhancements. The trial court sentenced him to a determinate term of 12 years, plus a consecutive term of life with the possibility of parole, plus a consecutive term of 50 years to life, plus a consecutive term of life without the possibility of parole.

DISCUSSION

I. Accomplice Testimony

Nguyen argues the jury unlawfully convicted him based on the uncorroborated accomplice testimony of Cuong, Phuoc, and Phong. We disagree.

“The law requiring corroboration of accomplice testimony is well established. ‘A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof’ (§ 1111.) “‘The requisite corroboration may be established entirely by circumstantial evidence. [Citations.] Such evidence ‘may be slight and entitled to little consideration when standing alone. [Citations.]’” [Citations.] “‘Corroborating evidence ‘must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged.’ [Citation.]” [Citations.] In this regard, ‘the prosecution must produce independent evidence which, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged. [Citation.]’ [Citation.] “‘Corroborating evidence is sufficient if it substantiates enough of the accomplice’s testimony to establish his credibility [citation omitted].” [Citation.]” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128.)

“A defendant’s own testimony may be sufficient corroborative testimony, and false or misleading statements made to authorities may constitute corroborating evidence. [Citations]” (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1022-1023.) Here, Nguyen denied knowing or meeting Diep, yet there were photographs showing the two men together. Nguyen also denied knowing Phuoc, Phong, or Cuong, people Ha said she met through Nguyen or knew Nguyen to associate with at parties. Additionally, Nguyen offered an alibi for the night of the shooting before Whitney told him when the shooting

occurred, which suggests Nguyen had knowledge of the shooting and was attempting to conceal any connection with the crime. (*People v. White* (1941) 48 Cal.App.2d 90, 95 [participation in crime may be inferred from defendant's false or contradictory statements that appear to be designed to conceal any connection with it].) Moreover, when Whitney asked Nguyen to be truthful concerning his involvement in the crime, Nguyen responded he was willing to be executed for the crime and he would not be a "rat." Vi, the gang expert, explained the risk of informing on fellow gang members and being considered a "rat." Based on Nguyen's refusal to "rat" on his fellow gang members, the jury could reasonably infer he had knowledge of the shooting and was concealing any connection with the crime. Additionally, the jury could reasonably infer Nguyen participated in the crime as he was willing to be executed rather than "rat" on his confederates.

Nguyen made false and misleading statements concerning his knowledge of the shootings, he refused to divulge any information regarding his fellow gang members, and he denied knowing any of the people involved. Nguyen's false and evasive statements were designed to conceal any connection with the crime, and they constituted corroborating evidence of the accomplice's testimony concerning Nguyen's participation in the shooting. The accomplices all testified Nguyen got into Diep's car with the gun. Cuong and Phuoc testified Nguyen fired the shotgun, and Phong testified that after everyone returned to the garage, Nguyen boasted he shot a rival gang member. Therefore, Nguyen's false and misleading statements to Whitney provided substantial corroborating evidence establishing the accomplice's credibility.

II. CALCRIM No. 600

Nguyen contends the trial court erroneously instructed the jury with the "kill zone" paragraph of Judicial Council of California Criminal Jury Instructions (2006) CALCRIM No. 600. The Attorney General asserts Nguyen forfeited appellate review of this issue because he did not object to the instruction at trial, and the instruction was

proper. Nguyen responds the instruction affected his substantial rights. We agree with the Attorney General.

A. Forfeiture

“Generally, “[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.” [Citations.]” (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1236 (*Campos*)). When the trial court inquired whether it was appropriate to include kill zone paragraph in CALCRIM No. 600, the prosecutor indicated she would argue that theory because there was only one shot. Defense counsel did not object. Thus, Nguyen’s challenges to the instruction’s correctness and its applicability are therefore forfeited. Moreover, as discussed below, even if the objections had been preserved for appeal, we would nonetheless reject them.

B. Kill Zone

The trial court instructed the jury with CALCRIM No. 600, “Attempted Murder,” as follows: “The defendant is charged in [c]ount 2 with attempted murder. [¶] To prove that the defendant is guilty of attempted murder, the People must prove that: [¶] 1. The defendant took at least one direct but ineffective step toward killing another person; AND [¶] 2. The defendant intended to kill that person. [¶] A direct step requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt. [¶] A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or ‘kill zone.’ In order to convict the defendant of the attempted murder of . . .

Phan, the People must prove that the defendant not only intended to kill . . . Chuong *but also either intended to kill . . . Phan, or intended to kill anyone within the kill zone*. If you have a reasonable doubt whether the defendant intended to kill . . . Phan or intended to kill . . . Chuong by harming everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of . . . Phan.” (Italics added.)

Nguyen claims the kill zone paragraph precluded the jury from having to find he specifically intended to kill Phan. Specifically, he contends the jury could infer he intended to kill someone within the zone and Phan was within the zone. We conclude when read in their entirety, the instructions properly required the jury to find Nguyen intended to kill Phan before convicting him of attempted murder.

“In determining the correctness of jury instructions, we consider the instructions as a whole. [Citations.]” (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1061.) We evaluate Nguyen’s challenge to CALCRIM No. 600 by determining whether there is a reasonable likelihood the jury misconstrued or misapplied the words. (*People v. Frye* (1998) 18 Cal.4th 894, 957, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Here, there was no possibility the jury convicted Nguyen by *inferring* he intended to kill someone within the kill zone and Phan was within that zone. The trial court properly instructed the jury on the elements of attempted murder, including the requirement Nguyen had the specific intent to murder Phan, and on the principles of deliberation and premeditation. And, the court instructed the jury that to convict Nguyen of the attempted murder of Phan under the kill zone theory, it had to conclude beyond a reasonable doubt Nguyen intended to kill Phan or anyone in the kill zone—he “either *intended to kill . . . Phan, or intended to kill anyone within the kill zone . . .*” (Italics added.) Additionally, the instruction informed the jury that if it had a reasonable doubt Nguyen *intended to kill Phan or intended to kill everyone in the kill zone*, then the jury must find Nguyen not guilty of the attempted murder of Phan. (*Campos, supra*, 156 Cal.App.4th at pp. 1243-1244.) Therefore, there was no possibility

the jury could have misapplied CALCRIM No. 600 so as to fail to find Nguyen had the specific intent to kill Phan.

With respect to Nguyen's claim CALCRIM No. 600 was inapplicable because there was only a "single shot," it is nonsense. It is common knowledge shotguns fire, and scatter, multiple shots. This effect is analogous to the "hail of bullets" described in *People v. Bland* (2002) 28 Cal.4th 313, 330, marking the shotgun as an imprecise weapon similar to those mentioned as appropriate for kill zone analysis in that decision. Indeed, Whitney testified that when he interviewed Phan, Phan would scratch his bandaged head and a pellet would come out, and Phan said he had pellets in his head that would not come out for some time. Thus, the trial court properly instructed the jury with CALCRIM No. 600.

DISPOSITION

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

MOORE, J.